In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-630

TERMINAL FLOUR MILLS CO. and
GENERAL FOODS CORPORATION,
Petitioners,

v.

HELIX MILLING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Ninth Circuit

Brief for Respondent in Opposition

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OPINIONS BELOW

The Opinion of the District Court (Petition, App. B) is unreported. The Opinion of the Court of Appeals for the Ninth Circuit (Petition, App. A) is not yet officially reported.

JURISDICTION

Jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Can an agreement between two companies for the acquisition by one of a flour mill owned by the other, which agreement itself has the effect of preventing a former competitor from acquiring the mill and reentering the market—a consequence known to the two contracting companies—be a contract or combination in restraint of trade in violation of Section 1 of the Sherman Act?

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (Petition, App. D).

STATEMENT OF THE CASE

Prior to March 15, 1969 all parties to this action were competitors in flour and millfeed markets in the Pacific Northwest (C.T. 529). On that date the mill owned by Respondent Helix Milling Company ("Helix") was destroyed by fire. Due to the high cost of construction, transportation rates and other factors, the only feasible way for Helix to remain in, or reenter, those markets was to acquire an existing mill in the Pacific Northwest. The only suitable mill which was available was the Igleheart mill owned by Petitioner General Foods Corporation ("General"). General determined to retire from the flour milling business at the same time and wanted to sell this mill (C.T. 531).

After Helix and General had conducted negotiations concerning Helix's acquisition of the Igleheart mill, Petitioner Terminal Flour Mills Co. ("Terminal") determined that it would like to acquire that mill and commenced negotiations with General. Terminal and General both knew that if Terminal acquired the mill Helix would be precluded from reentering the market and reestablishing itself as Terminal's only significant competition in the Defense Supply Agency submarket (C.T. 433-434). For the purposes of this case it is of no consequence whether this was or was not a specific reason for Terminal's interest in the mill. It is only important that this was a necessary result of acquisition by Terminal.

Ultimately, General determined to sell the Igleheart mill to Terminal on the same terms as it had previously negotiated with Helix. At the time this decision was made, Helix was ready, willing and able to purchase the mill and General would have sold the mill to Helix but for its decision to sell it to Terminal (C.T. 530, ll. 24-48). General and Terminal reached agreement on all terms and conditions and a written contract was prepared. This contract was signed by General and forwarded to Terminal (C.T. 530). Prior to Terminal's signing the contract this suit was brought by Helix, and General sought to withdraw its acceptance of Terminal's offer (C.T. 654). Terminal stated that the written contract accurately set forth the parties' agreement (C.T. 655) and cross-claimed against General for specific performance of the written contract (C.T. 69 *et seq.*, esp. 75, ll. 13-20). Terminal maintained this position for nearly three years, until it moved for and was granted dismissal of its cross-claim.

From the moment General and Terminal reached their agreement until Terminal's cross-claim was dismissed, Helix was precluded from acquiring the mill and reentering the market. This was a necessary consequence of both the agreement itself and Terminal's insistence on seeking specific performance. By the time the cross-claim was dismissed, Helix, having been out of operation for almost four years, was no longer in a position to acquire the mill. The mill is still owned and operated by General and is still for sale. Contrary to petitioner's statement of facts (Petition, p. 5), Helix has not abandoned its claim to en-

force its alleged agreement with General to purchase the mill but will only be able to do so if it prevails in this case.

ARGUMENT

I. Because of the Interlocutory Nature of the Ruling of the Court of Appeals and the Unusual Facts of the Case, It Would Be Inappropriate for this Court to Grant the Petition.

Helix's appeal to the Court of Appeals in this case followed the District Court's decision granting summary judgment against Helix on its antitrust claims. The Court of Appeal's decision simply remands Helix's claim under Section 1 of the Sherman Act for trial along with Helix's claims against General for fraud, misrepresentation and promissory estoppel, over which the District Court has retained jurisdiction. Since the Court of Appeals' decision is interlocutory in nature, this Court should not grant the petition for a writ of certiorari to review the decision. It is not yet ripe for review by this Court. *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372 (1893); *Brotherhood of Locomotive Firemen v. Bangor & Arrostook R.R.*, 389 U.S. 327, 328 (1967).

Petitioners argue that the holding of the Court of Appeals will have far-ranging consequences on legitimate business negotiations. The facts demonstrate that this is not so. To the contrary, the holding is so narrow as to make the case inappropriate for review by this Court. The key facts are that although an agreement of acquisition was reached, Terminal never took over operation of the mill; it was the agreement *itself* that had the effect of unreasonably restraining competition by foreclosing re-entry of a competitor into a market. As the Court of Appeals noted (Petition, p. A10), its holding is necessarily narrow ". . . given the unusual factual context of the case." As narrow as the holding is, however, it is consistent with the policy of the antitrust laws to strike down collaborative

action which prevents competitors from entering a given market. *United States v. Griffith*, 334 U.S. 100, 107 (1948); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), and the other cases cited by the Court of Appeals (Petition, pp. A4 & A5).

II. The Decision Below That Specific Intent Is Not a Necessary Element of a Violation of Section 1 of the Sherman Act Is Clearly Correct.

Petitioners argue that the Court of Appeals erred in holding that in this case Helix may prevail without proving that the Petitioners acted with specific anticompetitive intent. The court did so hold; but it did not err. As the Court of Appeals noted, the jury could find a sufficient anticompetitive intent "from the defendant's action in agreeing to a course of action which would necessarily exclude Helix from the market. . . ." (Petition, p. A8).

The law in this area was well stated by this Court in *United States v. Griffith*, 334 U.S. 100, (1948):

> "It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. [Citations omitted] To require a greater showing would cripple the Act. [Citations Omitted] Specific intent . . . is necessary only where the acts fall short of the results condemned by the Act . . .
> (334 U.S. at 105)
>
> • • •
>
> "And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result

is the necesary and direct consequence of what he did." (334 U.S. at 108).

Contrary to petitioner's contentions (Petition, pp. 9-11) the so-called "refusal to deal" and "termination" cases represent no departure from this principle. In those cases the only significant "effect" was on the business expectation of the plaintiff, not on the market. In any of those cases if such an effect on the market could have been shown, a cause of action under Section 1 would have existed as it does here.

For example, in *Joseph E. Seagram & Sons, Inc., v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. den.*, 396 U.S. 1062 (1970), on which Petitioners most strongly rely, the court held that a decision by manufacturers to trade with one distributor rather than another did not constitute a *per se* violation of Section 1 as a group boycott. The court stated, however, "We agree that a combination or conspiracy to establish a common distributor *could be shown* to have such an adverse purpose *or* effect on competition that it would violate Section 1 as an unreasonable restraint of trade." (416 F.2d at 78) (Emphasis supplied).

In *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), discussed by the Court of Appeals (Petition, pp. A6 & A7) and by Petitioners (Petition, pp. 9 & 10), this Court required proof of an anticompetitive purpose in a rule of reason case, but only because there was no proof of any anticompetitive effect, as Justice Harlan recognized in his dissent, 368 U.S. at 486.

In *Bushie v. Stenocord Corp.*, 460 F.2d 116, 119 (9th Cir. 1972), discussed in this case by the Court of Appeals (Petition, p. A7) and cited on page 10 of the Petition, the court held that the plaintiff had failed to show anything from which it might be inferred that defendant's actions re-

strained trade *or* were motivated by an anti-competitive intent.

Petitioners argue (Petition, p. 14) that the Court of Appeals decision will permit the use of Section 1 of the Sherman Act to accomplish an extension of Section 7 of the Clayton Act, 15 U.S.C. § 18, into "an amorphous middle ground . . . between a tendency toward monopolization and monopolization itself". This argument misses the point. The Court of Appeals held that an uncompleted acquisition was not an "acquisition" and thus not within the *specific* language of Section 7 (Petition, p. A12). This is an entirely separate issue from inquiring whether a contract or combination which blocks the re-entry of a former competitor into a market is an unreasonable restraint of trade.

CONCLUSION

For the foregoing reasons it is respectfuly submitted that this Petition for a Writ of Certiorari should be denied.

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